STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TREMAINE NIGEL MOSES,

Defendant-Appellant.

UNPUBLISHED
December 28, 2004

No. 249781
Oakland Circuit Court
LC No. 02-186542-FC

Before: Borrello, P.J., and Murphy and Neff, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and carrying a concealed weapon (CCW), MCL 750.227. Defendant pleaded guilty to being a felon in possession of a firearm, MCL 750.224f, and one count of felony-firearm. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to 30 to 60 years in prison for the second-degree murder conviction, 2 to 7½ years in prison for the CCW conviction, 2 to 7½ years in prison for the felon in possession of a firearm conviction, and two years in prison for each felony-firearm conviction. We affirm.

Defendant argues that the trial court committed error requiring reversal in denying his request for instructions on the lesser included offenses of voluntary and involuntary manslaughter. We disagree. We review claims of instructional error de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). To warrant reversal of a conviction based on the failure to instruct the jury on a lesser included offense, a defendant must show that it is more probable than not that the failure to give the requested lesser included offense instruction undermined the reliability of the verdict. *People v Cornell*, 466 Mich 335, 365; 646 NW2d 127 (2002); *People v Lowery*, 258 Mich App 167, 172-173; 673 NW2d 107 (2003).

In *Cornell*, the Supreme Court interpreted MCL 768.32 as prohibiting a trial court from giving instructions on cognate lesser offenses. *Cornell, supra* at 354-355. However, the Supreme Court held that an "instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *Id.* at 357. At the time of defendant's trial, neither voluntary nor involuntary manslaughter was a necessarily included lesser offense of murder under Michigan law. See, e.g., *People v Pouncey*, 437 Mich

382, 387-388; 471 NW2d 346 (1991) (holding that voluntary manslaughter is a cognate lesser offense of murder); *People v Van Wyck*, 402 Mich 266, 268; 262 NW2d 638 (1978) (holding that manslaughter is not a necessarily included offense of murder), overruled in part by *People v Mendoza*, 468 Mich 527, 544, 548; 664 NW2d 685 (2003); *People v Cheeks*, 216 Mich App 470, 479; 549 NW2d 584 (1996) (holding that both voluntary and involuntary manslaughter are cognate lesser offenses of murder). Because manslaughter was a cognate lesser offense of murder at the time the trial court instructed the jury in defendant's case, the Supreme Court's holding in *Cornell* prohibited the trial court from instructing the jury on manslaughter. *Cornell*, *supra* at 354-355.

Following the trial court's ruling in this case, our Supreme Court held contrary to prior case law that both voluntary and involuntary manslaughter constitute necessarily included lesser offenses of murder and that "when a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence." *Mendoza*, *supra* at 541. Defendant argues that *Mendoza* applies retroactively and that the trial court committed error requiring reversal by not instructing the jury on voluntary and involuntary manslaughter. Retroactive application of *Mendoza* would not alter the result in this case because even if we determined that *Mendoza* applied retroactively, we would still uphold the trial court's decision not to give a voluntary and involuntary manslaughter instruction because a rational view of the evidence does not support instructions on either voluntary or involuntary manslaughter. *Cornell*, *supra* at 357; *Mendoza*, *supra* at 529, 541. Because we conclude that a rational view of the evidence would not support an instruction on either form of manslaughter, we need not, and do not, determine whether *Mendoza* applies retroactively.

We first address the trial court's failure to give a voluntary manslaughter instruction. The Supreme Court has defined voluntary manslaughter as:

> '[T]he act of killing, though intentional, [is] committed under the influence of passion or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the temporary excitement, by which the control of reason was disturbed, rather than of any wickedness of heart or cruelty or recklessness of disposition . . . .' [*Mendoza*, *supra* at 535, quoting *Maher v People*, 10 Mich 212, 219 (1862).]

Thus, to show voluntary manslaughter, one must show that the defendant killed in the heat of passion, that the passion was caused by adequate provocation, and that there was not a lapse of time during which a reasonable person could control his passions. *Id*.

Defendant argues that his ex-girlfriend's sexual relationship with the victim constituted adequate provocation to support a voluntary manslaughter instruction. According to defendant, he "snapped" when he saw a box of condoms on the dresser of the motel room that his ex-girlfriend, Katrina Steverson, was sharing with the victim. "Most jurisdictions recognize provocation as a mitigating circumstance where a person discovers a spouse committing adultery." *People v Eagen*, 136 Mich App 524, 527; 357 NW2d 710 (1984). However, "'[t]he rule of mitigation does not . . . extend beyond the marital relationship so as to include engaged persons, divorced couples and unmarried lovers . . . ." *Id.*, quoting LaFave & Scott, Criminal Law, § 76, p 576. In this case, defendant and Steverson were not married. While

they had been involved in a romantic relationship, they were not involved in a relationship at the time of the offense because defendant had ended the relationship the day before. Moreover, defendant did not actually observe Steverson and the victim involved in a sexual relationship. We therefore reject defendant's contention that seeing the box of condoms and realizing that Steverson was engaged in a sexual relationship with the victim constituted adequate provocation sufficient to warrant a voluntary manslaughter instruction. Because there was no other evidence of adequate provocation, a rational view of the evidence does not support a voluntary manslaughter instruction. *Cornell, supra* at 357; *Mendoza, supra* at 529, 541.

Similarly, we conclude that an instruction on involuntary manslaughter was not supported by a rational view of the evidence. Involuntary manslaughter is defined as:

> the unintentional killing of another, without malice, during the commission of an unlawful act not amounting to a felony and not naturally tending to cause great bodily harm; or during the commission of some lawful act, negligently performed; or in the negligent omission to perform a legal duty. [*Mendoza, supra* at 536.]

Here, defendant does not indicate under which theory an instruction for involuntary manslaughter would be supported, but merely argues that the instruction would be supported because the gun was fired accidentally. We disagree. The evidence did not support a finding that defendant's killing of the victim was unintentional. Defendant claimed that he did not intend to kill the victim and that his gun went off accidentally when the victim kicked him and tried to grab defendant's left hand, which was holding the gun. The evidence suggests otherwise. Defendant supposedly went to the victim's motel room to sell the victim marijuana, but defendant did not have any marijuana in his possession when he went to the room. Defendant did, however, possess a gun when he went to the room. Upon entering Steverson's and the victim's room, defendant pulled the gun out. As defendant proceeded toward Steverson, yelling and swearing, the victim stood between defendant and Steverson. Steverson ran into the bathroom and heard two gunshots. Defendant then kicked the bathroom door and said, "he dead now, bitch." The medical examiner testified that the victim died from multiple gunshots, one of which went through his heart. The trajectory of the bullets was consistent with the victim being on his back on the floor and defendant standing at the victim's feet. Gunpowder residue on the victim's clothes indicates that defendant shot the victim from a distance of three to five feet. The victim also suffered a fractured nose and other facial injuries indicating a pistol whipping. Defendant did not call 911 for help for the victim nor did he tell the responding officers that he shot the victim by mistake. We reject defendant's claim that the shooting was unintentional when he went to the victim's motel room with a gun and then discharged the gun two or more times at the victim while the victim was lying down on the floor. On the contrary, the evidence supports a finding that defendant acted with malice aforethought. See *People v Holtschlag*, 471 Mich 1, 6 n 3; 684 NW2d 730 (2004). Because there was no evidence that the killing was unintentional, a rational view of the evidence did not support an involuntary manslaughter instruction. *Cornell, supra* at 357; *Mendoza, supra* at 529, 541.

Affirmed.

/s/ Stephen L. Borrello
/s/ William B. Murphy
/s/ Janet T. Neff